Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)-2330–10 OF 2013
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND VARGHESE GEORGE JJCA
12 MAY 2016

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Civil Procedure — Appeal — Assessment of damages — Senior assistant registrar awarded damages — Trial judge affirmed award on appeal — Whether learned trial judge used correct principles of law in assessment of damages — Whether respondent suffered any loss of use of land — Whether award cause grievous miscarriage of justice to appellants — Whether appellate court should interfere with award given by trial court

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This was an appeal against the decision of the learned trial judge in affirming an assessment and award of damages by the learned senior assistant registrar ('SAR2') in favour of the respondent. Initially, the respondent had brought an action against the appellants for wrongful occupation of a land and sought for orders for vacant possession and damages to be entered against the appellants. The learned trial judge found in favour of the respondent and upon appeal by the appellant, the appeal court affirmed the decision of the trial court. In the hearing for assessment of damages, in affirming the award given by the SAR2, the learned trial judge awarded the respondent with damages in term of loss of use of the land amounting to RM63,873,000. Hence, this appeal. The appellants submitted that the learned trial judge had misapplied the correct measure of damages to be adopted in assessment of damages. The appellants also submitted that the respondent had not suffered any 'loss of use' since the land had markedly appreciated in value in the period between the purchase of the land by the respondent and the judgment. It was further submitted that such award had caused grievous miscarriage of justice against the appellants as the assessment was based on the whole land instead of portions of land occupied by the appellants. In reply, the respondent contended that the appellants were joint tortfeasors, thus, there was nothing wrong in imposing liability on them jointly irrespective of the extent of their individual involvement. The respondent also submitted that the assessment of damages based on the '5% of the market value of land' was appropriate and that the appellate court should be slow to interfere with an award of damages where there were concurrent findings or assessment. The issue for determination was whether there was a serious error as to the right principles used in this case for the assessment of damages by the SAR2.

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Held, allowing the appeal, setting aside the award of damages by the High Court:

(1) For the purpose of proper assessment of damages, the respondent had failed to put forward before the court any credible evidence of the projected 'profits' by the fact that the land could not be developed, or alternatively, reliable evidence of either what would represent a fair rental at market rates that the plaintiff would have in all probability earned from the particular area of the land that was occupied respectively by each of the defendants, or what would be a fair rental benefit that would have likely accrued to each of defendants from the respective areas within the land that each of them had wrongfully occupied. Further, the learned SAR2 ought not to have ordered the sweeping damages without further consideration on the fact that the respondent had only deprived of the use of such actual area in the land occupied by each the appellants (see paras 33–34).

(2) There was no evidence led by the respondent why '5%'pa was a justifiable return in the circumstances of the land in the case. To accept a flat rate would be obviously antithetical to fairness and common sense in the natural course or order of things. This ought to have been adduced through a professional valuer with proof derived from comparable rental data available from similarly placed property in that locality. The wholesale adoption of the '5%' formula by the trial court without further critical analysis of its very basis and crucial evidential support was totally unjustified both on the facts and in law in this case (see paras 40–41).

(3) In the present case, there was no diminution in value of land caused by the trespass by the appellants and there was also no direct evidence adduced as to any costs of 'repairs' incurred by the respondent in respect of the land. Further, there was no evidence of what would be a fair rental that the respondent could have expected from the specific land, much less any apportionment of liability for any such loss of rental as amongst the individual appellants, with reference to the respective areas separately occupied by them. Ultimately therefore, the respondent's claim for damages was unsustainable on evidence and ought to have been rejected outright (see para 43).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim perbicaraan yang bijaksana dalam mengesahkan award ganti rugi oleh timbalan pendaftar kanan ('SAR2') yang memihak responden. Pada mulanya, responden telah membawa tindakan terhadap perayu-perayu bagi penghunian salah tanah dan memohon bagi perintah-perintah untuk milikan kosong dan ganti rugi dimasukkan terhadap perayu-perayu. Hakim perbicaraan yang bijaksana memihak responden dan atas rayuan oleh perayu, mahkamah rayuan mengesahkan keputusan

mahkamah perbicaraan. Dalam pendengaran penaksiran ganti rugi, dalam mengesahkan award yang diberikan SAR2, hakim perbicaraan yang bijaksana mengawardkan kepada responden dengan ganti rugi dari segi kehilangan penggunaan tanah berjumlah kepada RM63,873,000. Maka rayuan ini. Perayu-perayu berhujah bahawa hakim perbicaraan yang bijaksana telah menyalahgunakan ukuran ganti rugi yang betul untuk diguna pakai dalam penaksiran ganti rugi. Perayu-perayu juga berhujah bahawa responden tidak mengalami apa-apa 'loss of use' semenjak tanah tersebut telah secara nyata meningkat nilai dalam tempoh di antara pembelian tanah oleh responden dan penghakiman tersebut. Ia dihujahkan selanjutnya bahawa award sedemikian telah menyebabkan ketidakadilan yang serius terhadap perayu-perayu kerana penaksiran didasarkan atas tanah keseluruhan bukan bahagian-bahagian tanah yang dihuni oleh perayu-perayu. Dalam menjawab, responden berhujah bahawa perayu-perayu adalah pelaku tort bersama, oleh itu, tidak terdapat apa-apa kesalahan dalam mengenakan liabiliti ke atas mereka secara bersama tanpa mengira setakat mana penglibatan individu mereka. Responden juga berhujah bahawa penaksiran ganti rugi berdasarkan ke atas '5% of the market value of land' adalah wajar dan bahawa mahkamah rayuan patut perlahan-lahan untuk campur tangan dengan award ganti rugi di mana terdapat dapatan atau penaksiran yang selaras. Isu untuk penentuan adalah sama ada terdapat kesilapan serius terhadap prinsip-prinsip betul digunakan dalam kes ini bagi penaksiran ganti rugi oleh SAR2.

Diputuskan, membenarkan rayuan, mengetepikan award ganti rugi oleh Mahkamah Tinggi:

(1) Bagi tujuan penaksiran betul ganti rugi, responden telah gagal untuk mengemukakan di hadapan mahkamah apa-apa keterangan boleh dipercayai mengenai 'profits' yang diunjurkan oleh sebab bahawa tanah tersebut tidak dapat dibangunkan, atau secara alternatif, keterangan boleh dipercayai sama ada apa yang akan merupakan sewa adil pada kadar pasaran yang plaintif mungkin dalam kesemua kemungkinan memperoleh pendapatan daripada kawasan tertentu tanah yang dihuni oleh setiap defendan masing-masing, atau apa yang menjadi sewa-faedah adil yang mungkin terakru kepada setiap defendan daripada kawasan masing-masing dalam tanah yang setiap mereka telah menghuni secara salah. Selanjutnya, SAR2 yang bijaksana tidak patut memerintah ganti rugi menyeluruh tanpa pertimbangan selanjutnya atas fakta bahawa responden hanya dinafikan penggunaan kawasan sebenar di tanah yang dihuni oleh setiap perayu-perayu (lihat perenggan 33–34).

(2) Tidak terdapat keterangan yang dikemukakan oleh responden mengapa '5%' setahun adalah pemulangan berjustifikasi dalam keadaan tanah dalam kes ini. Untuk menerima kadar rata akan menjadi secara jelas bertentangan kepada keadilan dan akal dalam keadaan semula jadi atau prosedur. Ini patut dikemukakan melalui penilai profesional dengan

bukti yang diperolehi daripada data sewa sebanding yang didapati daripada hartanah yang terletak dengan serupa di kawasan yang sama tersebut. Menggunapakai jualan keseluruhan formula '5%' oleh mahkamah perbicaraan tanpa analisa kritis selanjutnya atas dasarnya dan sokongan keterangan penting adalah sama sekali tidak berjustifikasi kedua-duanya dari segi fakta dan undang-undang dalam kes ini (lihat perenggan 40–41).

(3) Dalam kes ini, tidak terdapat pengurangan dalam nilai tanah disebabkan oleh pencerohan perayu-perayu dan juga tidak terdapat keterangan terus dikemukakan terhadap apa-apa kos 'repairs' yang ditanggung oleh responden berkaitan tanah tersebut. Selanjutnya, tidak terdapat keterangan mengenai apa yang akan menjadi sewa adil yang responden jangkakan daripada tanah spesifik tersebut, pasti bukan apa-apa pembahagian liabiliti bagi apa-apa kerugian sewa di antara perayu-perayu individu, dengan rujukan kepada kawasan masing-masing yang dihuni secara berasingan oleh mereka. Oleh itu akhirnya, tuntutan responden bagi ganti rugi tidak boleh dikekalkan atas keterangan dan patut terus terang (lihat perenggan 43).]

Notes

For cases on assessment of damage, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1049–1057.

Cases referred to

Beatrice Ramanathan & Anor v Shah Alam Properties Sdn Bhd & another case [1994] 4 CLJ 646, HC (refd)
Cottrill v Steyning and Littlehampton Building Society [1962] QBD 196, QBD (refd)
Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601, HL (refd)
Goo Sing Kar v Dato' Lim Ah Chap & Ors [2013] 3 MLJ 374, CA (refd)
Inverugie Investments v Hackett [1995] 3 All ER 841, PC (refd)
Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors [2001] 2 CLJ 385, CA (refd)
Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336, HC (refd)
Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals [2008] 5 MLJ 128; [2008] 3 CLJ 692, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd [1966] 1 MLJ 412 (distd)

Appeal from: Civil Suit No 22–480 of 2000 (High Court, Johor Bahru)

Badrol Hisham Md Sani (Zainal & Badrol) for the appellants.
Tan Jee Tjun (Thomas & Philip) for the respondent.

Varghese George JCA:

[1] The appeal before us was against the decision of learned High Court judge in Johor Bahru Civil Suit No 22–480 of 2000 which on 18 September 2013 had affirmed an assessment and award of damages by the learned senior assistant registrar ('SAR').

[2] After having heard and considered the submission of the respective counsel for the parties, we had allowed the appeal and set aside that award of damages. We now set out our grounds for doing so.

[3] The appellants (in total 291 individuals) were the defendants in the aforementioned suit. The respondent, who was the plaintiff, was at the time of the commencement of the action in 2000 the registered owner of subdivided lots of land originally comprised in Grant 72 for Lot 83, Mukim of Plentong, Johor Bahru ('the land').

[4] The parties will be referred to in this grounds as they were at the High Court.

BACKGROUND

[5] The plaintiff had purchased the land from its previous owner, one Oakfield Enterprises Sdn Bhd, in March 1996. The plaintiff claimed that all the defendants were in wrongful occupation of the land and sought for orders for vacant possession and damages to be entered against the defendants.

[6] The defendants disputed that allegation and maintained that they had valid sale agreements with the previous owner of the land. Some of the defendants had also filed counterclaims against the plaintiff.

[7] After a full trial the High Court on 28 April 2003 allowed the plaintiff's claim. The High Court also ordered that the defendants pay damages to the plaintiff to be assessed by the learned SAR. The counterclaims brought were dismissed.

[8] The defendants pursued with an appeal against that decision but on 13 April 2007 the Court of Appeal dismissed that appeal (*Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128; [2008] 3 CLJ 692).

[9] The first hearing of the assessment of damages before the SAR was heard on 30 April 2009 ('SAR1'). The plaintiff adduced evidence through their first witness.

[10] The next hearing of the assessment was on 8 August 2012 before another SAR ('SAR2'). The second witness for the plaintiff and the only witness for the defendants gave evidence.

[11] On 27 May 2013 the SAR2 ordered that the defendants pay damages in the sum of RM63,873,000 to the plaintiff. The damages allowed was only part of the plaintiff's total claim in the sum RM110,577,404.71 which was made up of as follows:

(a)	Interest payment to bank:	RM31,626,754.64
(b)	Company expenses:	RM15,077,650.07
(c)	Loss of use of land calculated @ 5% of the value of land from 1996 to 2008	RM63,873,000

[12] The defendants appealed to the judge in chambers against that award of damages made in favour of the plaintiff. No appeal was taken by the plaintiff against that part of their claim that was not allowed.

[13] On 18 September 2013 the learned judge dismissed the appeal with costs and affirmed the award of damages made by SAR2.

[14] There were no grounds available in this case for the order of assessment made by SAR2, save that, as it would be noted, the only damages allowed coincided with the plaintiff's claim for the loss of use of the land for the period 1996–2008. Further the reasons given by the learned High Court judge in affirming that award, as recorded, was unfortunately brief; it did not condescend into any discussion of the rival contentions of the parties or an analysis of soundness of the 'measure of damages' applied by the court in this case. The learned judge merely stated as follows:

> This court sitting in its appellate jurisdiction should not give preference to its own figure simply because it disagrees with the figure arrived at by the learned senior assistant, who had the benefit of hearing the evidence. It is trite principle that before interfering the appellate court must be satisfied that the learned senior assistant registrar had acted on a wrong principle of law, or had misapprehended the facts, or had for these or other reasons made a wholly wrong estimate of the damage suffered: *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601. The decision must have resulted in a serious miscarriage of justice to warrant interference by this court. I do not find this to be such a case. In the circumstances the appeal is dismissed with costs.

THE APPEAL

[15] Before us counsel for the defendants submitted that both the SAR2 and the learned judge had misapprehended the peculiar facts surrounding this case and had in any case misapplied the correct measure of damages to be adopted in such circumstances. It was forcefully argued before us that the plaintiff, who had purchased the land for commercial development, had not suffered any 'loss of use' particularly since on the evidence adduced by the plaintiff itself, the land had markedly appreciated in value in the interim period, that is, between the time of its purchase by the plaintiff and the judgment (and/or date of assessment of damages); any such 'loss' or 'damage' suffered had been more than adequately compensated in any event by such increase in the market value of the land.

[16] It was also urged upon us that the award of damages as ordered by SAR2 and affirmed by the learned judge had occasioned a further grievous miscarriage of justice against the defendants, which, by itself warranted appellate intervention to be put right. The 'loss of use' as computed and advanced by the plaintiff was in respect of the so called deprivation of the use of the whole of the said land ('Lot 83') measuring in total an area of 2,812,585 sqft while the defendant (219 of them) comprised of only part of the 400 odd 'squatters' that were found on the land. More importantly, the defendants had only occupied between 4000–5000 sqft of land each; in such circumstances to impose on each of them with liability to meet the overall purported 'loss of use' (for the whole of the land, that is) without any proper apportionment on the basis of the actual area of land occupied separately by each of the defendants, it was argued breached all concepts of fairness or proportionality. The award of damage made by the court was therefore inherently unsustainable and ought to be reversed outright.

[17] In response, the plaintiff's contention was that the defendants were joint tortfeasors and having together or in concert participated in the commission of the tort of trespass, there was nothing amiss in imposing liability on them jointly (or even severally) for all the damages suffered by the plaintiff, that is, irrespective of the extent of their individual involvement *(Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385 (CA)).

[18] The plaintiff also asserted that the proper 'measure of damages' where there had been wrongful occupation or trespass to land was either the actual, or a notional 'loss of return' expected from the land. In this respects, in the absence of any direct evidence of loss, the '5% of the market value of land' applied in this case to equate a fair annual return expected from the land, was appropriate based on the decision of court in the case of *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd* [1966] 1 MLJ 412, where a

similar '5% of the capital value' was adopted as a reasonable annual return which a landowner would be entitled to.

[19] Of course, the plaintiff also submitted that an appellate court should be slow to interfere with an award of damages where there were concurrent findings or assessment. The learned judge had rightfully refused to interfere with the assessed damages and similarly this court should be disinclined to reverse the assessment that had been upheld, even if we felt that a lesser or different sum ought to have been awarded (*Topaiwah v Salleh* [1968] 1 MLJ 284(FC); *Goo Sing Kar v Dato' Lim Ah Chap & Ors* [2013] 3 MLJ 374 (CA)).

OUR DELIBERATION AND DECISION

[20] The principal question before us for determination was whether there had been a serious error as to the right principles that had been considered and applied in this case when the damages were assessed and ordered by SAR2.

The Federal Court per Suffian LP in *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 (quoting Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601) stated that an appellate court was not precluded from interfering with an award of damages, where it was demonstrated that the assessing judge had acted on a wrong principle of law, or had misapprehended the facts or has for those reasons made a wholly erroneous estimate of damage suffered.

[21] Even in *Topaiwah* too it was similarly noted that although an appellate court would normally decline to reverse or interfere with the quantum of damages awarded by a lower court, such intervention may be justified where the assessing judge '...had acted on some wrong principle of law or that the amount awarded was so extremely high or very small as to make it an erroneous estimate of the damages'.

[22] It was not in dispute that the plaintiff had purchased the land in 1996 at a consideration of RM32,577,452.31 (sale and purchase agreement dated 15 March 1996). In a valuation report made for the plaintiff by Messrs Jones Lang Wooton dated 19 April 1996 the then open market capital value of the land was opined by the said valuer to be RM56m even '... subject to existing squatters or occupiers on site'.

[23] Messrs Henry Butcher, another valuation firm had pursuant to a further valuation exercise, in their report dated 15 December 1997 assessed the then current market value free from encumbrances and with vacant possession to be RM225m.

[24] It was not in dispute that the market value of the subdivided lots in the land (with vacant possession) had varied over the years with a opined value of RM35 psf in July 1996, of RM40 psf in January 1997, with some dips to RM30 psf during the period 1999–2002 and a recovery thereafter to RM40 psf in 2004, RM45 psf in 2005, RM50 psf in 2006 and RM55 psf in 2007. This was evident from the valuation report dated 10 October 2008 made by Messrs Rahim & Co for the plaintiff.

[25] Finally there was also available on the records a valuation report dated 25 June 2012 made by Messrs Bahari & Co wherein the total market value of the land (as at 28 April 2012) with vacant possession was estimated to be RM267,197,900.

[26] Before the SAR2, the claim for 'loss of use' of land occasioned to the plaintiff calculated on the basis of the notional 5%pa return was tabulated and presented as follows:

Date of valuation	Market value	Loss of use of land: 5% of the market value of the land
As at 1 July 1996	RM98,270,000 (@RM35 psf)	RM4,913,500
As at 1 January 1997	RM112,300,000 (@RM40 psf)	RM5,615,000
As at 1 January 1998	RM98,270,000 (@RM35 psf)	RM4,913,500
As at 1 January 1999	RM84,230,000 (@RM30 psf)	RM4,211,500
As at 1 January 2000	RM84,230,000 (@RM30 psf)	RM4,211,500
As at 1 January 2001	RM84,230,000 (@RM30 psf)	RM4,211,500
As at 1 January 2002	RM84,230,000 (@RM30 psf)	RM4,211,500
As at 1 January 2003	RM98,270,000 (@RM35 psf)	RM4,913,500
As at 1 January 2004	RM112,300,000 (@RM40 psf)	RM5,615,000
As at 1 January 2005	RM126,340,000 (@RM45 psf)	RM6,317,000
As at 1 January 2006	RM140,380,000 (@RM50 psf)	RM7,019,000

Date of valuation	Market value	Loss of use of land: 5% of the market value of the land
As at 13 April 2007	RM154,410,000 (@RM55 psf)	RM7,720,500
Total Loss (RM)		RM63,873,000

[27] It was plain therefore that, notwithstanding that the plaintiff might have been *de facto* deprived of the physical use of the land by reason of the presence of the defendants and other unlawful occupiers thereon, the market value of the land had not been adversely diminished but to the contrary the plaintiff stood to benefit from a marked appreciation in so far as its market value was concerned during that interim period.

[28] Counsel for the defendant referred to us the case of *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336 where no damages were awarded where no property value loss was established on the evidence. That was a case where the entry of a caveat on a piece of land by a plaintiff had prevented the defendant from completing a sale of that piece of land to a third party. After trial the impugned caveat was ordered to be removed and the defendant awarded damages. The plaintiff's appeal against that decision was dismissed by the then Supreme Court. Also the defendant there had not put up the land for sale, after the sale to the third party was aborted.

[29] At the subsequent assessment of damages proceedings there, the defendant presented a claim premised upon calculations of the 'loss of interest on balance of purchase price' that would have been received from the third party, if that sale had gone through.

James Foong JC (as he then was) in refusing to award any damages, firstly noted that, in an assessment of damages it was for the party asserting the claim for damages (in that case the defendant) to prove real and actual loss sustained. More significantly, the learned judge explained why no damages was allowed in that case in the following manner:

> The usual approach to damages in these type of cases is by determining, in the first instance, whether there is a property value loss. By this, I mean whether there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being lifted. However, from the facts adduced before this court, I find no evidence of any property value loss.

and further:

> Under such circumstances, the defendant cannot establish as a matter of fact, that he has obtained (though it may be late in receiving), or will be under a contractual obligation to obtain, a definite sum of $3.005m since the said property has not been sold. As he has not obtained or will not be obtaining under any firm contractual

> obligation the sum of $3.005m, the defendant cannot be said to have suffered as at the date of this hearing for assessment of damages, actual loss on the use of $3.005m. Unless the money is already in hand (again, though it may be late in receiving), or will be received under a firm contractual obligation, the defendant suffers no real loss in terms of interest since there is no money or money due in the first place.

[30] In the instant case on appeal before us, it was not in dispute either that the plaintiff was a developer and had purchased the land for purposes of commercial/building development. The decision in *Cottrill v Steyning and Littlehampton Building Society* [1962] QBD 196, was cited to us as supporting the proposition that where a purchaser had purchased the land for development purposes, the measure for any 'loss' suffered if the purpose had been subsequently impeded, had to be established by reference to the profits contemplated or expected to be made by the purchaser, if the proposed development had gone through in time. The instructive observation of the court there in this regard was as follows:

> ... breach of contract for the sale of land knowing that the purchaser intended to develop the land for profit, special circumstances were established which entitled the purchaser to damages assessed by reference to the profits which both parties contemplated that the purchaser would make.

[31] It was undeniable that *in a normal case* where once a trespass to land or a deprivation of use of land had been established, the normal measure of damages to be applied would be the actual proof of 'loss of *rental*' or a reasonable estimation of such a 'rental return' that was directly attributable and flowing from a lawful use of the land but denied by that wrongful action. This was consistent with the two underlying basic principles in law which required that any damages awarded would, so far as money can, put the affected or deprived party in the same position as he would have been if the tort had not occurred subject to the further overriding consideration that such damages to be awarded was in any event not too remote or speculative in nature.

[32] In *Inverugie Investments v Hackett* [1995] 3 All ER 841,the Privy Council opined (in an appeal from the Bahamas Court of Appeal) that although the plaintiff might not have suffered any actual loss by being deprived of the use of property, he was still entitled to recover a reasonable rent for the wrongful use of his property by the trespasser, and similarly, even if the trespasser might not have derived any actual benefit from the use of the property, he was still obliged to pay a reasonable 'rent' for the benefit or use he enjoyed based on what has been termed as the 'user principle'.

Lord Lloyd of Berwick delivering the advice said as follows:

A ... of the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw LJ in *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240 at p 242; [1979] 1 WLR 285at p 288 as follows:

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> It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort of the plaintiff, when he has established that the defendant has remained on as a trespasser on residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the
C value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.

It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines
D the 'loss' which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in *Mediana (owner) v Comet (owners), The Mediana* [1900] AC 113 at p 117; [1900–3] All ER Rep 126 at p 129, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.

E In *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 at p 402; [1988] 1 WLR 1406 at p 1416 Nicholls LJ called the underlying principle in these cases the 'user principle'. The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser.
F *Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both*.

G **[33]** The question then was how, these established principles governing the issue of 'damages' recoverable where one has been wrongfully deprived of the use of land, was to be applied to the facts of this case. It was our considered view that on the *peculiar facts of this case* (as outlined above), what was incumbent upon the plaintiff was to adduce:

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(a) credible evidence indicative of the projected 'profits' the plaintiff had been denied by the fact that the land could not be developed as was intended (ie when it was purchased); and

(b) *alternatively*, reliable evidence of *either* what would represent a fair rental
I at market rates that the plaintiff would have in all probability earned from the particular area of the land that was occupied respectively by each of the defendants, *or* what would be a fair rental benefit that would have likely accrued to each of defendants from the respective areas within the land that each of them had wrongfully occupied.

[34] The plaintiff had failed to put forward before the court any such evidence, which was alternatively open to the plaintiff (as identified above), for a proper assessment of 'damages' to be undertaken. Further and more glaringly the plaintiff also failed to demarcate and identify the size of the actual area within the land that had been separately and individually occupied by each of the defendants respectively. In the absence of such relevant material being placed before the court, SAR2 ought not to have ordered the sweeping damages, as the court did here, implicating all the defendants without further taking into consideration the fact that the plaintiff had only been deprived of the use of such actual area in the land occupied by each of the defendants.

[35] Ideally, as a basic premise to sustain their claim for damages, the plaintiff should at least have called some evidence to show how the acts of the defendants in wrongfully occupying the land (or parts of it) had frustrated the commercial or business interest of the plaintiff in the envisaged planned development of the whole area comprised in the land. Such evidence, it must be noted, was also lacking in this case.

[36] What was before the assessing SAR2 was the bare reliance by the plaintiff on the decision in *Toyo Textiles* to underpin the assertion that a sum calculated at 5%pa of the market value of any land represented the annual 'loss' or 'yield' in respect of land affected by the trespass. In our view this assertion by the plaintiff was wholly misconceived. In our further view, SAR2 and the learned judge, with respect, had failed to appreciate the full purport of that decision and appear to have been persuaded by a misreading of that case.

[37] *Toyo Textiles* was firstly wholly distinguishable on the facts to the situation at hand in this appeal. The claim in that case was founded in an action for nuisance against a neighbour for damages caused to the plaintiff's contiguously adjoining land. The damage in question was the flooding and water logging occasioned to the plaintiff's land as a result of the defendant's interference with a water course or natural stream caused by the raising by the defendant of the level of the defendant's land. The defendant had been ordered to by the court and had agreed to take remedial measures to restore the plaintiff's land to its original state. The defendant had failed to do so. This had in turn delayed the plaintiff's plans to obtain approval from the authorities to develop the plaintiff's own land.

[38] It was in this rather compounded default scenario and particular turn of events that there Shankar J (as he then was) held that 'for lack of a better yardstick' that damages on a notional basis for a reasonable return for a landowner so affected land would be 5% of the capital value of the plaintiff's land calculated on a yearly basis. It must be noted that, firstly, the damages awarded there was *not for trespass to land per se*. Secondly, a closer reading of that

judgment would show that the court did not anywhere lay out as an acceptable principle that in all cases involving land, 5% of the capital or market value of land should form a reasonable or indicative 'loss of return' or 'loss of yield' annually for the wrongful deprivation of use of the land; to the contrary the learned judge there was careful to state that the order made there was in the circumstances of the peculiar developments and facts there.

[39] The SAR2 and the learned judge in this case before us had clearly misdirected themselves when they accepted that '5%' of market or capital value of the land (varying from year to year over the interim years) represented a fair return or rental expected from the land for all intents and purposes. They ought to have rightfully asked — why 5%? Why not 3% or 7% or even 10%?

[40] Rental return on bare land or built-up property, as we all know, would principally depend on the location (site) of the subject property and supply and demand factors of market forces there. It would therefore be variable from place to place and over any given period of time. To accept a flat rate would be obviously antithetical to fairness and common sense in the natural course or order of things. In any event, there was no evidence led by the plaintiff why '5%'pa was a justifiable return in the circumstances of the land in this case; this ought to have been adduced through a professional valuer with proof derived from comparable rental data available from similarly placed property in that locality.

[41] In our view, the wholesale adoption of the '5%' formula by the courts below without further critical analysis of its very basis and crucial evidential support, was totally unjustified both on the facts and in law, in this case.

[42] It was noteworthy that in *Beatrice Ramanathan & Anor v Shah Alam Properties Sdn Bhd & another case* [1994] 4 CLJ 646 , (where the surrounding facts were almost similar to that obtaining in the *Toyo Textiles* case) in an action for nuisance and/or negligence affecting one's right related to land, the court there had taken a different approach. Lim Beng Choon J had this to say:

> From the cases cited above, it is clear to me that in order to achieve the general object underlying the rules for the assessment of damages in the case of a tort causing damage to real property, the court is required to apply one or the other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors. Be that as it may the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on to the property merely for investment purposes. On the other hand if the plaintiff intends to continue to occupy it and to repair the damage the proper measure is clearly the cost of all such repairs.

In the event, the proper measure of damages that was applied in that case was to compensate on the basis of the costs of all repairs and reinstatements incurred, and not the 'loss' arising from the diminution in the value of the property, although shown to have occurred there.

[43] In the instant appeal before us, the plaintiff undeniably continued to be the landlord of the land. In any case there was no diminution in value to the land directly caused by the 'trespass' of the defendants to parts of the land; to the contrary, the overall land had appreciated in value in the interim. There was also no direct evidence adduced as to any costs of 'repairs' or of damages incurred by the plaintiff with respect to the parts of the land occupied by the defendants individually. As noted above there was also no evidence of what would be a fair rental that the plaintiff could have expected from the specific land, much less any apportionment of liability for any such loss of rental as amongst the individual defendants, with reference to the respective areas separately occupied by them. On all counts therefore, the plaintiff's claim for damages was unsustainable on evidence and ought to have been rejected outright.

[44] For the reasons discussed and elaborated above we were satisfied that this was a case which clearly warranted appellate intervention to set aside the award of damages made by SAR2 and rather mechanically affirmed by the learned judge.

Appeal allowed; award of damages by the High Court set aside.

Reported by Dzulqarnain Ab Fatar